6-6-05

NO. 05-0148; 05-0145; 04-1144

IN THE SUPREME COURT OF TEXAS

EDGEWOOD I.S.D., *ET AL.*,

Appellants,

v.

SHIRLEY NEELEY, IN HER OFFICIAL CAPACITY AS THE COMMISSIONER OF EDUCATION, *ET AL.*,

Appellees.

On direct appeal from the 250th Judicial District Court of Travis County, Texas

REPLY BRIEF OF EDGEWOOD APPELLANTS

EDGEWOOD, YSLETA, LAREDO, SAN ELIZARIO, SOCORRO, SOUTH SAN ANTONIO, LA VEGA, KENEDY, HARLANDALE, BROWNSVILLE, PHARR-SAN JUAN-ALAMO, SHARYLAND, MONTE ALTO, EDCOUCH-ELSA, LOS FRESNOS, RAYMONDVILLE, HARLINGEN, JIM HOGG COUNTY, LA FERIA, ROMA, SAN BENITO, and UNITED INDEPENDENT SCHOOL DISTRICTS

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EDGEWOOD APPELLANTS' REPLY BRIEF

TO THE HONORABLE SUPREME COURT OF TEXAS:

Edgewood I.S.D., *et al.*, ("Edgewood Appellants") file this Reply to State Appellees' Brief.

Summary of the Argument

The arguments presented in State Appellees' ("the State") Brief mischaracterize both the trial court's judgment and Edgewood Appellants' position in this litigation. More importantly, they fail to apply the legal principles established by fifteen years of jurisprudence by the Supreme Court of Texas regarding financial efficiency in public school funding.

The State's argument that this Court should ignore the true amount being spent by school districts on maintenance and operations, in favor of an improperly narrow conception of the revenue gap between low-wealth and wealthy public schools, has no basis in law. Furthermore, the State's own admissions support the conclusion that the system is financially inefficient for Edgewood Appellants. Edgewood Appellants urge this Court to reverse and render the trial court's judgment in favor of Edgewood Appellants, or in the alternative, reverse and remand the judgment to the trial court for further proceedings.

Argument

I. THE TRIAL COURT PROPERLY EXERCISED JURISDICTION OVER THE EFFICIENCY CLAIM ASSERTED BY EDGEWOOD APPELLANTS.

The State argues that the Supreme Court should *affirm* the trial court's judgment that the system is constitutionally efficient because Edgewood Appellants raise claims: that are non-justiciable political questions; school districts cannot assert a private right of action; and school districts lack standing. *See* State Appellees' Br. at 17. As an initial matter, the State's argument is fatally flawed because this Court cannot conclude that the trial court lacked jurisdiction over the case and, simultaneously, affirm the judgment of the trial court. The State also failed to preserve its argument related to the dismissal of the trial court's decision. Finally, the State's arguments fail for the same reasons cited in Edgewood Appellants' Response Brief under Docket No. 04-1144.

A. The State Provides No Legal Authority In Support Of Its Request To Affirm The Trial Court's Judgment.

The State's request, that this Court affirm the trial court's judgment on financial efficiency, presents no legal authority in support of affirming the judgment. For this reason, the State waives its argument for affirmance. By incorporating by reference argument and authority, made in another brief, that the trial court lacked jurisdiction, the State cites cases and argues on the question of jurisdiction only.

A brief must contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record. Tex. R. App. P. 38.1(h). The State's request to affirm the decision, which necessarily presumes that the trial court had jurisdiction to hear Edgewood Appellants' claims, is utterly unsupported by the case

citations and record cites presented in their argument that the Court should dismiss the claims for lack of justiciability, standing, and a private right of action. By failing to cite authority on the issue of affirmance, the State waived that issue. *See Brady v. Brady*, 2004 Tex. App. LEXIS 7393 (Tex. App.—San Antonio 2004).

B. The State Failed To Preserve Its Contention That Edgewood's Claims Should Be Dismissed.

To the extent that the State asks, in this appeal, this Court to dismiss the trial court's judgment for lack of jurisdiction, the State failed to preserve such contention. An appeal is perfected when a written notice of appeal is filed with the trial court clerk. Tex. R. App. P. 25.1(a). A party who seeks to alter the trial court's judgment or other appealable order must file a notice of appeal. Tex. R. App. P. 25.1(c).

The State did not file a written notice with the clerk appealing the trial court's judgment on financial efficiency of the funding for maintenance and operations, and, therefore, cannot now ask this Court to alter the trial court's judgment by dismissing the claims. *See Geneva Brooks v. Northglen Assoc.*, 141 S.W.3d 158, 171 (Tex. 2004) ("Northglen did not file a notice of appeal from the trial court's judgment, did not notice a cross-appeal, and did not petition this court for review on the point. Accordingly, Northglen did not preserve this issue for our review.")

C. As A Matter Of Law, Edgewood Appellants Have Standing To Present Efficiency Claims, Which Are Justiciable And Provide A Right Of Action.

Should this Court address the arguments concerning justiciability, private right of action and standing raised in State Appellants' Brief, Edgewood Appellants hereby

incorporate by reference Section III of its Appellees' Brief, filed under Docket No. 04-1144. This Court addressed the financial efficiency claims of Edgewood Appellants on three separate occasions over the past 16 years, finding the system both constitutional and unconstitutional, and there is no reason the Court should reverse course and refuse to address similar constitutional claims brought by many of the same property-poor districts. *See generally Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391 (Tex. 1989) ("*Edgewood I*"); *Edgewood Indep. Sch. Dist. v. Kirby*, 804 S.W.2d 491 (Tex. 1991) ("Edgewood II"); *Edgewood v. Meno*, 917 S.W.2d 717 (Tex. 1995) ("*Edgewood IV*").

II. ADEQUACY AND EFFICIENCY ARE NOT INTERCHANGEABLE ISSUES.

A. The Supreme Court Recognizes Separate Duties Of The Legislature To Provide An Adequate And An Efficient System Of Public Free Schools.

The State wrongly asserts that simply because a system is adequate, the system is also presumptively efficient, and fails to cite to any authority supporting its proposition. *See* State Appellees' Br. at 18. In *West Orange-Cove Cons. Indep. Sch. Dist. v. Neeley*, the Court reiterated that the State must perform three separate duties to fulfill its obligations under Article VII, section 1 of the Texas Constitution: provide an adequate education, through suitable means, in an efficient manner. 107 S.W.3d 558, 563 (Tex 2003) ("*West Orange-Cove*").

In *Edgewood IV*, the Court concluded that the State delivered an adequate education through the accreditation system. *See* 917 S.W.2d at 729. Upon deciding the issue of adequacy, the Court did not concurrently pronounce the system constitutionally efficient. Instead, the Court proceeded to inquire whether both necessary elements of

efficiency were satisfied: "qualitative efficiency" and "financial efficiency". *See id.* at 730. After determining that the State satisfied the "qualitative" element by providing property-poor and property-rich districts access to funds to provide an accredited education, the Court examined the "financial" element by measuring the gap in tax rates between property-poor and property-rich districts. *Id.* at 731.

B. The State Misapprehends The Trial Court's Judgment Concerning Efficiency.

Following the guidance of this Court, the trial court below examined adequacy and efficiency separately. *See* CR3:844 (Judgment). Contrary to State Appellees' Brief, the trial court did not, "refuse to find that the system is constitutionally inefficient as to maintenance and operations funding."[1] *See* State Appellees' Br. at 4. The trial court found the Texas school finance system "inadequate" because it fails to provide each student with an "education needed to participate fully in the social, economic, and educational opportunities available in Texas." *Supra* note 1; *cf., West Orange-Cove,* at 580 (quoting *Edgewood IV*, 917 S.W.2d at 736). The trial court also found the system qualitatively inefficient because it fails to provide school districts with the resources necessary to provide an adequate education. *Supra* note 1; *cf. Edgewood IV*, 917 S.W.2d at 729.

[1] Specifically, the trial court declared the following in its judgment: "the current funding capacity of the Texas school finance system fails to provide Intervenor districts with sufficient access to revenue to provide for a general diffusion of knowledge to their students, in violation of the efficiency, suitability and adequacy provisions of Article VII, section 1 of the Texas Constitution, particularly when taking into account (1) the inadequacy of the weight adjustments for bilingual, economically disadvantaged, and other special needs students and (2) the greater burden borne by Intervenor districts of the inadequacy of those weights, given their student populations, which are disproportionately LEP and economically disadvantaged." CR3:844 (emphasis added).

In its brief, the State attempts to collapse the categories of adequacy and efficiency, arguing in a bootstrapping fashion that since the State proved the school finance system is adequate, it must be efficient as a matter of law. *See* State Appellees' Br. at part II. Plainly, the State must not only provide an adequate education, but it must provide an adequate education in a qualitatively and financially efficient manner for all children in both property-poor and property-rich districts. *See id.* at 566 (citing *Edgewood I*, 777 S.W.2d at 397). Therefore, the two standards of adequacy and qualitative efficiency cannot be "functionally identical" as alleged by the State.[2] *See* State Appellees' Br. at 18.

III. THE STATE SEEKS TO IMPROPERLY RESTRICT THE INQUIRY INTO FINANCIAL EFFICIENCY

The State urges the Court to ignore the resources available to the varying school districts altogether, as well as this Court's directive that "there must be a direct and close correlation between a district's tax effort and the educational resources available to it." *See Edgewood I*, 777 S.W.2d at 397. The State boldly asserts in their brief that "the system is 'already efficient' once property-wealth and property-poor districts have funds sufficient to provide an adequate education," regardless of whether the tax effort and revenue are similar for the districts. *See* State Appellees' Br. at 20-21.

[2] Under the State's flawed rationale, it could satisfy its constitutional duty to provide an adequate education (and, by default, an efficient system) by having an accreditation system in place, regardless of the resources available to school districts to meet the standards. According to the State, even if it cost $4,500 to meet the accreditation standards, and the State provided only $3,500 to some districts, the system would still be efficient simply because it had an "adequate" system in place. Clearly, the Court did not intend such a system to survive a constitutional challenge. *See Edgewood I*, 777 S.W 2d. at 395 (the State must provide an "efficient" system, not one that is "cheap," "inexpensive," or even "economical").

Under the State's misguided notion, property-poor districts could tax at $1.50 to generate the funds necessary to provide an adequate education while property-rich districts tax at $1.00 to generate the same revenue, and despite such disparities, the State would declare the system constitutionally efficient solely because the districts have "funds sufficient to provide an adequate education." Such a proposition does not survive the Court's financial efficiency test by providing "substantially equal access to similar revenues at similar tax effort." *See Edgewood I*, 777 S.W.2d at 397; *Edgewood II*, 804 S.W.2d at 496; *Edgewood IV*, 917 S.W.2d at 729.

A. The State's Attempt To Limit The Efficiency Analysis To The Foundation School Program Fails As A Matter of Fact and Law.

At one point in its Brief, the State argues that the Court does not need the trial court to make additional findings and conclusions in order to determine whether the system is constitutionally efficient. *See* State Appellees' Br. at 38. Yet, throughout its Brief, the State urges this Court to step into the role of fact finder by presenting the Court with numerous disputed facts concerning the Foundation School Program (FSP), as well as other disputed facts that were not found by the trial court. *See id.* at 26 & 30-31; *supra* note 4; *see also infra* part V (citing other disputed facts). In fact, the State's entire argument concerning the FSP is premised on facts disputed by Edgewood Appellants and on facts unsupported by the record. *See* State Appellees' Br. at 26 & 30-31. The State's attempt to convert the Texas Supreme Court into a fact finder contravenes the Texas Constitution and case law. *See* TEX. CONST. art. V, § 3; TEX. GOV'T CODE ANN. § 22.001 (West 2004); *see also In re King's Estate*, 244 S.W.2d 660, 665 (Tex. 1951) (the

Supreme Court may only decide questions of law). Therefore, its argument concerning the FSP fails as a matter of law.

First, the State incorrectly presents as "fact" its contention that the FSP gap is only $300. This disputed statement of fact excludes other revenue and benefits located within the FSP, including but not limited to compensatory education set-asides, facilities, and the Available School Fund. *See* TEX. EDUC. CODE §§ 42.002, 42.152(a) & 42.251. Although the State does not deny the existence of other components of the FSP that provide disparate revenue to school districts, the State arbitrarily limits its analysis to the guaranteed yields and the basic allotment in order to arrive at its drastically understated figure of $300. *See* State Appellees' Br. at 33 (recognizing, but not disputing, several built-in provisions of the FSP).

Second, the State wrongly presents as "fact" its contention that the FSP gap was cut in half from $600 to $300 since *Edgewood IV*. The $600 gap referred to in *Edgewood IV* included the "unequalized distribution of other funds" such as the Available School Fund, whereas the State's purported $300 gap does not. *See* 917 S.W.2d at 731 & n.11. When the current system's "unequalized distribution of other funds" is included in the computation of today's gap (as in *Edgewood IV*), the true gap in FSP funding is almost double, and up to over five times, the amount in *Edgewood IV*.[3] *See* Edgewood Appellants' Br. at 28.

[3] The undisputed facts referred to by Edgewood Appellants in their brief show that average Chapter 41 districts access more than $1,127/WADA in M&O revenue than property-poor districts at equal taxing rates of $1.48. Hold harmless-districts access an additional $2,400 per weighted student, providing those districts with a total of more than $70,500 than property-poor districts for a classroom of 20 "weighted" students. *Id.*

Additionally, the State erroneously presents as "fact" its contention that the ratio of the disparity in access to funds between property-rich and property-poor districts based on the FSP gap is only 1.07-to-1, or 1.39-to-1 when based on Dr. Albert Cortez's revenue gap, compared to the 1-to-1.36 ratio in *Edgewood IV*. The State's disputed ratio was derived in a manner wholly inconsistent with the method employed in the *Edgewood IV* decision, and thus, grossly understates the current, actual ratio of yields. Because the *Edgewood IV* Court excluded hold-harmless revenue, and because districts could access funds for a general diffusion of knowledge within the two tiers, the Court determined the ratio of the *yields* for the wealthiest and the poorest districts to be 1.36 to 1. *See Edgewood IV*, 917 S.W.2d at 731. The State erroneously computes this ratio by comparing the *revenue*, rather than the *yields*, available to districts. *See id.*; *but cf.* State Appellees' Br. at 31-33. Using the same *Edgewood IV* analysis of the *yields* available to the wealthiest and poorest districts, the ratio of today is much larger than that alleged by the State and found by the Court 10 years ago. Ultimately, the State does not dispute the fact that today's yields are 2.25-to-1 between the wealthiest and the poorest districts. *See State Appellees' Br.* at 32; *see also* Alvarado Appellants' Br. at 14 and note 4. This ratio accurately reflects the glaring disparities in the current system, ultimately supporting a reversal of the trial court's contention.

Disputed facts aside, the State's argument that the Supreme Court should rely solely on the FSP as a measure of financial efficiency fails in other respects as a matter of law. Traditionally, this Court never excluded the revenue for any public school district from its analysis of efficiency. *See e.g. Edgewood II*, 826 S.W.2d 491 (where the Court

considered the revenue of the 5% of districts purposefully set outside of the equalized system by the State). In *Edgewood IV*, the Court excluded hold-harmless revenue from its efficiency analysis only because the State promised to quickly eliminate such windfalls in order to improve the equity of the system; a point readily conceded by the State. *See* State Appellees' Br. at 27 (citing *Edgewood IV*, 917 S.W.2d at 731 & n.12). Thus, the Court excluded the hold-harmless revenue only because the State promised the Court that it would be phased out. *See Edgewood IV*, 917 S.W.2d at 734.

Currently, the hold-harmless provisions are a permanent feature of the Texas educational system and have been increased over the years. *See* TEX. EDUC. CODE § 41.002(e). For this reason, in order to more closely match the analysis conducted by the *Edgewood IV* Court, this Court should reject the State's call to restrict the analysis to the FSP gap and should instead perform the same type of analysis as that done in 1995, *i.e.*, by including the total funding available to property-poor and property-rich districts. *See Edgewood IV*, 917 S.W.2d at 731 & n.12. The revenue available to hold-harmless districts should be considered when answering the question whether all districts have "substantially equal access to similar revenue at similar tax effort." *See generally, Edgewood I*, 777 S.W.2d 391, *Edgewood II*, 804 S.W.2d 491, and *Edgewood IV*, 917 S.W.2d 717.

Additionally, the State presents no argument that Edgewood Appellants can provide an accredited education or an adequate education solely with the funds available from the Foundation School Program. In fact, the trial court found that Austin I.S.D., a Chapter 41 focus district of the West Orange-Cove Plaintiffs, was unable to provide an

adequate education with the greater revenue they access as a property-rich district at $1.50. *See* CR4:893; FF162. The Court also found that Edgewood Appellants, as property-poor districts, were unable to provide a general diffusion of knowledge to their students with the maximum amount of funds available from the State, not limited to the yields and the basic allotment. *See* CR4:945; FF434-436. Without demonstrating that FSP funding alone permits districts to provide an adequate education, the State's argument that the FSP is the proper measure of efficiency fails as a matter of law.

B. The Built-In Provisions Collectively Contribute to an Inefficient System

Edgewood Appellants do not, as suggested by the State, contend that the mere existence of built-in provisions benefiting property-wealthy districts renders the school finance system unconstitutional. On the contrary, Edgewood Appellants identify how each provision operates and then explain how they collectively contribute to the overall inefficiency of the system. *See* Edgewood Appellants' Br. at 24-27. The State's attempt to justify these built-in provisions as rational policy choices simply does not address the question of whether these provisions contribute to an inefficient system.[4]

In arguing that the system must be equitable so that all districts can provide for a general diffusion of knowledge, Edgewood Appellants do not argue, as claimed by the

[4] The State presents the Court with disputed allegations concerning the built-in provisions that were not found by the trial court or not evidenced in the record. For instance, Edgewood Appellants dispute the State's characterization of the financial impact of the choices as being "relatively small" and this fact was not found by the Court. *See* State Appellees' Br. at 33. Edgewood Appellants also dispute the State's factual assertions that the wealth hold-harmless provisions allow school districts to solely enrich themselves, because the State fails to account for their effect in providing an adequate education at substantially lower tax rates.[4] *See id* at 34. Edgewood Appellants further dispute the State's characterization of the effect of compensatory education set-asides and its proposed exclusion of the set-asides from the equity analysis. State expert, Dr. Joe Wisnoski, admitted that the set-asides lessen the equity in the system for property-poor districts. *See* CR28:46.

State, that school districts should receive less funding and the system should be "dumbed down." *See* State Appellants' Br. at 22 (mischaracterizing the argument in Edgewood Appellants' Br. at 34). Edgewood Appellants seek a school system in which all students receive the "education needed to participate fully in the social, economic, and educational opportunities available in Texas," *see West Orange-Cove* at 580 (quoting *Edgewood IV*, 917 S.W.2d at 736). The State's suggestion that predominantly-Latino school districts would seek to lower educational standards is not only inaccurate, it is offensive.

Edgewood Appellants' analysis follows the Court's well-established practice: "Once policy choices have been made by the Legislature, it is the Judiciary's responsibility in a proper case to determine whether those choices *as a whole* meet the standard set by the people in Article VII, § 1." *West Orange-Cove*, 107 S.W.3d at 582 (emphasis added). Texas Courts have always analyzed the underlying components in the system to determine whether the system as a whole is constitutionally efficient and this practice was followed by Edgewood Appellants when presenting their evidence at trial. *See generally Edgewood I*, 777 S.W.2d 391; *Edgewood II*, 804 S.W.2d 491; and *Edgewood IV*, 917 S.W.2d 717; *see also* Edgewood Appellees' Response Br. at 24-27, fully incorporated herein.

The State does not contest the gaps found by the experts for Edgewood Appellants after analyzing the system as a whole. Ultimately, the built-in provisions contribute collectively to a system that is financially inefficient for property-poor districts, denying them "substantially equal access to similar revenue at similar tax effort." *See Edgewood*

I, 777 S.W.2d at 397; *Edgewood II*, 804 S.W.2d at 496; *Edgewood IV*, 917 S.W.2d at 729.

C. When The School Finance System Fails To Provide Resources To Deliver An Adequate Education, An Examination Of The Revenue Gap Is Appropriate.

In the present case, because the State fails to provide property-poor districts with the funds necessary to provide a general diffusion of knowledge when taxing at the maximum rate of $1.50, the Court can measure the revenue gap. *See Edgewood IV*, 917 S.W.2d at 731 (explaining that the Court must focus on the tax rate differentials only because districts "can attain the revenue necessary for a general diffusion of knowledge" at rates below $1.50); *see also* Edgewood Appellants' Br. § V(A).

The *Edgewood IV* Court found that "when the focus is placed on the rate differential rather than on the gap in funding, it becomes evident that the existing disparity in access to revenue is not so great that it renders Senate Bill 7 unconstitutional." *Edgewood IV*, 917 S.W.2d at 731-32. By reverse implication, had the *Edgewood IV* Court considered the revenue gap in funding rather than the tax rate gap, the $600 disparity would have been "so great that it renders Senate Bill 7 unconstitutional." *See id.* The undisputed evidence at trial showed that the $600 gap has increased significantly over the years since *Edgewood IV* and supports a reversal of the trial court's decision concerning the financial efficiency of M&O funding.[5] *See* Edgewood Appellants' Br. §§ V(A)-(D); *see also supra* note 3.

[5] The State also errs in suggesting that Edgewood Appellants' argument is based merely on the fact that because the disparities in total funding have increased since *Edgewood IV*, the system is inefficient as a matter of law

IV. A CORRECT CALCULATION OF TODAY'S TAX RATE GAPS REVEALS THE SYSTEM TO BE CONSTITUTIONALLY INEFFICIENT.

When the State's own evidence of a $0.17 tax rate gap between property-rich and property-poor districts is properly applied to the Court's precedent, the State's argument fails. The $0.17 gap reflects the State's failure to improve upon the equity established in the past and evidences the State's ultimate failure in providing all districts with "substantially equal access to similar revenue at similar tax effort." *See Edgewood IV*, 917 S.W.2d at 729.

A. The State's Failure To Grasp The Trial Court's Duty Contributes To Its Erroneous Arguments Concerning the Gap.

The State mischaracterizes the legal standard when it describes both the trial court's responsibility to weigh the evidence and the trial court's ultimate judgment regarding the adequacy of the system. The State carries forward this error when urging this Court to limit its analysis of the difference in tax rates. The trial court was not required to state an exact figure for the cost of an adequate education. *See* State Appellees' Br. at 27. It was enough for the trial court to find that the maximum amount of revenue available to property-poor districts was insufficient to provide a general diffusion of knowledge to each of their students. *Cf. Edgewood IV*, 917 S.W. 2d at 731 (conversely, finding that the evidence established that all districts attained the revenue for a general diffusion of knowledge at tax rates below $1.50). Whether it was based on the

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Edgewood Appellants do not base their argument on an insignificant increase in the funding gap. Unlike the State, Edgewood Appellants understand that the test for financial efficiency consists of whether all districts have "substantially equal access to similar revenue at similar tax efforts." *See Edgewood IV*, 917 S.W.2d at 729 (quoting *Edgewood I*, 777 S.W.2d at 397). For this reason, Edgewood Appellants presented the trial court with an array of undisputed evidence depicting the stark disparities in revenue received and taxes levied between property-rich and property-poor districts *See* Edgewood Appellants' Br. §§ V(A)-V(D).

cost-studies, the testimony from the superintendents, or other evidence in the record, the trial court's judgment that the system is inefficient and inadequate should be upheld. *See Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992) (ruling that a trial court's judgment shall be upheld if it can be supported on any legal theory supported by the evidence).

The State further misapplies the relevant case law by arguing that the tax rate gaps between property-rich and property-poor districts, in order to be constitutionally inefficient, must be grossly disparate, "such as the 700-to-1 ratio at issue in *Edgewood I*." *See* State Appellees' Br. at 21. The State's argument is based on an incorrect reading of *Edgewood I*. In that case, the 700-to-1 ratio found by the Court was based on the difference in *property values per student*, not the difference in tax rates. 777 S.W.2d at 392 (explaining that the wealthiest district has over $14,000,000 of property wealth per student, while the poorest has approximately $20,000, reflecting a 700-to-1 ratio).

Also, despite having somewhat narrowed the tax rate gaps found in *Edgewood I*, the system in *Edgewood IV* was found just "minimally acceptable" and "only when viewed through a prism of history." *See* 917 S.W.2d at 726. Thus, the Court does not require the State to return to the gross disparities of *Edgewood I* in order for the system to be declared unconstitutional, although the disparities today are comparable. As stated in the briefs of Edgewood and Alvarado Appellants, the undisputed evidence shows that the current system is far worse for property-poor districts than the system found "minimally acceptable" ten years ago because tax rate and revenue gaps have increased significantly and the districts are unable to provide for a general diffusion of knowledge. *See generally* Edgewood Appellants' Br. and Alvarado Appellants' Br.

The State errs in its analysis of the tax rate gaps because it, once again, seeks to exclude hold-harmless districts from the efficiency analysis. The State does not deny that these districts generate substantially greater revenue than property-poor districts beginning with the very first penny of tax effort. In fact, the State implicitly acknowledges the substantially greater access to funds of hold-harmless districts when it requests that the Court exclude these wealthy public school districts from its analysis of the financial efficiency of the current system. *See* State Appellees' Br. at 26; *see also supra* part III(A).

B. The State Distorts The $0.17 Gap in Tax Rates.[6]

The State calculates what it contends is a $0.17 gap by calculating a percentage of the "equalized" system up to $1.79 and then comparing this to the $0.09 gap as a percentage of the then-current "equalized" system up to $1.50 under *Edgewood IV*. *See* State Appellees' Br. § III(A)(2) at 29-30. The State's analysis of its own gap fails to properly evaluate whether the State has provided a financially efficient system.

First, the State's calculation does not compare the disparity in access to similar revenue at similar tax rates – the analysis required by the Court in evaluating financial efficiency. *See Edgewood I*, 777 S.W.2d at 397; *Edgewood II*, 804 S.W.2d at 496; *Edgewood IV*, 917 S.W.2d at 729. Quite simply, the Court has never compared the tax

[6] Curiously, the State argues that the only way to compare the *Edgewood IV* tax rate gap to the current $0.17 gap that their own witness, Dr. Joe Wisnoski attested to, is to exclude the hold-harmless districts from any financial efficiency analysis. *See* State Appellees' Br. at 27. The State acknowledges that the State made the hold-harmless provision permanent after *Edgewood IV* and does not dispute that the provisions have been phased up over time. *Id*

rate gap as a ratio to the maximum rates available within the "equalized" system in measuring financial efficiency. *See id.*

Second, by the State's own admission, the $0.17 gap reflects only the difference between the maximum Tier 2 rate ($1.50, from which they are unable to generate the funds necessary for a general diffusion of knowledge) available to property-poor districts for maintenance and operations (M&O) and the rate necessary for an average Chapter 41 district to generate the same revenue. *See* State Appellees' Br. at 28. However, the State artificially reduces the $0.17 gap by adding $0.29 of taxes attributable to facilities financing through an interest and sinking (I&S) rate. However, the $0.09 gap referred to in *Edgewood IV* concerned rates for M&O, not I&S. *See Edgewood IV*, 917 S.W.2d at 746 ("The evidence adduced at trial shows that the poorest districts in the State must levy a maintenance and operations tax of approximately $1.31 to provide the operations revenue necessary for a general diffusion of knowledge.") Therefore, should the Court consider the ratio comparison offered by the State, the current $0.17 must be compared to $1.50, not the $1.79 offered by the State that includes I&S tax rates.[7]

By comparing the $0.09 gap in *Edgewood IV* to the $0.17 gap in the current case, the Court will find that the gap has nearly doubled. Even at $0.17, the difference underestimates the actual tax gap by providing three assumptions in favor of the State: 1) it does not take into account the greater tax rate gap that would be necessary to generate the greater funds necessary for property-poor and property-rich districts to provide a

[7] *See* Edgewood Appellees; Br at 71-73, fully incorporated herein (discussing the similarly failing argument made by the State's but in the context of a purported $0.08 I&S gap amounting to only 4% of $1.79).

general diffusion of knowledge; 2) the $0.17 does not reflect the difference between the wealthiest and the poorest districts, which would undoubtedly be greater; and 3) the $0.17 does not include the difference in yields under Tier 1, whereby Chapter 41 and hold-harmless districts access even greater wealth per penny of tax effort.[8]

Despite the State's under-calculation of the $0.17 gap, this gap nevertheless demonstrates the State's failure to provide property-poor districts "substantially equal access to similar revenue at similar tax effort" as required by our Constitution and the Court. *See Edgewood IV*, 917 S.W.2d at 729.

C. Unequalized Supplementation Has Limitations.

In support of its position that the $0.17 gap is not so great so as to render the system unconstitutional, the State mistakenly contends that Supreme Court precedent permits unrestricted inequity beyond the funds necessary for a general diffusion of knowledge. In *Edgewood II*, the Court stated that efficiency must be maintained before districts are allowed to supplement their revenue with additional local taxes. 804 S.W.2d at 500. The Court in *Edgewood IV* further clarified that the "amount of 'supplementation' in the system cannot become so great that it, in effect, destroys the efficiency of the entire system." 917 S.W.2d at 732. In the present case and in contravention to Court precedent, the State allows wealthy districts to supplement their educational programs by retaining substantially greater amounts of revenue for each penny of tax effort and excludes their revenue from the equalization system, while

[8] This gap also does not reflect the benefits most Chapter 41 districts receive from the option credits and the Available School Fund, which would undoubtedly decrease the tax rates further below $1.33 for those property-rich districts to generate $1,736.96. *See* Edgewood Appellants' Br. at 24-26

property poor districts do not have access to funds at the maximum tax rates for a general diffusion of knowledge. *See id.* at 733 (allowing districts to tax at a rate *in excess* of $1.50 creates no constitutional issue) (emphasis added); *see also* Edgewood Appellants' Br. § V(A) at 23-28.

V. THE SUPREME COURT NEED NOT ADDRESS THE DISPUTED FACTUAL ISSUES RAISED BY THE STATE.

The State's Brief asks this Court to accept as true proposed "facts" that are not only absent from the findings made by the trial court but are also disputed by Edgewood Appellants. This Court has long-held that it will not take jurisdiction over a direct appeal of any question of fact and will only consider questions of law. Tex. R. App. P. 57.2 ; TEX. CONST. art. V, § 3; TEX. GOV'T CODE ANN. § 22.001 (West 2004); *In re King's Estate*, 244 S.W.2d 660, 665 (Tex. 1951).

In its appeal, the State failed to preserve any challenge to the factual findings made by the trial court. The State cannot now urge the Court to resolve disputed findings (*e.g.*, make a finding that the test scores of limited-English proficient children do not evidence the inadequacy of the system when the trial court already made findings to the contrary). Compare State Appellees' Br. at 21-24 to CR4:944-957; FF437-539; *see also* Edgewood Appellees' Br. at 41-43, 46-49.

Edgewood Appellants have presented the Court with numerous instances in which the State asks the Court to find facts that were not found, or even rejected, by the trial court. *See e.g., supra* part III (the purported facts surrounding $300 FSP gap).

With respect to its argument that test scores of Limited English Proficient (LEP) children should be excluded from the efficiency analysis, the State fails to makes a single reference to the evidence and the record in this case, asserting instead that "LEP students, by definition, are not proficient in English, and thus can be expected to face substantial difficulties on an English-language test." *See* CR4:962; FF574; *see also* RR25:153-154.[9]

The State's Brief heatedly charges that Edgewood Appellants "erroneously cit[e] low passage rates" of LEP students under the current Texas Assessment of Knowledge and Skills and compare those passage rates to the Texas Assessment of Academic Skills. *See* State Appellees' Br. at 22 n.19. In fact, it was the trial court that made this finding, which was then cited by Edgewood Appellants in their brief. *See* Edgewood Appellants' Br. at 6 (citing CR4:960; FF554); *see also* FF575. The State cannot escape the trial court's findings of fact by now asking this Court to review the evidence and make contradictory findings.

The State's argument that the performance gap evidenced by LEP students should be ignored by this Court is inconsistent with the findings of the trial court, was refuted by expert testimony at trial, and flies in the face of the State's own standard that requires all students, regardless of language ability, to meet the State's academic standards. *See* CR4:962; FF574; *see also* RR25:153-154. Edgewood Appellants sincerely hope that Texas has progressed to the point at which it considers LEP students to be capable of academic achievement on a par with English proficient students; Edgewood Appellants

[9] Even the State's lone citation fails to support the State's contention that "many eleventh-grade LEP student have been in the Texas school system only a few years" or that those students "had little or no formal education, even in their native language." *See* State Appellees' Br. at 22 (citing RR26.30-31); compare CR4.948, FF462.

reject the State's position that LEP students cannot be expected to succeed as reminiscent of the "soft bigotry of low expectations" criticized by President George W. Bush. *See* President George W. Bush, Address at the Daytona International Speedway Root Property, *Remarks by the President at Victory 2004 Rally* (October 16, 2004) located at http://www.whitehouse.gov/news/releases/2004/10/20041016-10.html. Similarly, the State's characterization of Edgewood Appellants' desire to obtain the resources to raise the test performance LEP students with an attempt to "dumb-down" standardized tests reflects the worst sort of assumptions about Latino students and the school administrators serving those students. *See* State Appellees' Br. at 22.

Because the State failed to present any expert opinion during trial on bilingual education it cannot now ask this court to accept as true statements that directly contradict the trial court's findings. *See Advertising Displays, Inc. v. Cote*, 732 S.W.2d 360, 363 (Tex. App.—Houston 14th Dist. 1987) (citing *Tankard-Smith, Inc. General Contractors v. Thursby*, 663 S.W.2d 473, 476 (Tex. App.—Houston 14th Dist. 1983) (refusing to consider evidence that was not on file with the trial court before judgment and not in evidence); *see also* TEX. R. EVID. 702.

The State's Brief further attempts to introduce information regarding United I.S.D., an Edgewood Appellant school district that was not designated as a focus district by any party. *See* State Appellees' Br. at 24, n.24; *see also* CR4:859; FF5. Not only was United I.S.D. never designated as a representative district, the test scores for one grade of students, now selectively presented by the State, were never before the trial court, never

became part of the record, and therefore, cannot carry weight on appeal. *See Advertising Displays*, 732 S.W.2d at 363 (citing *Tankard-Smith*, 663 S.W.2d at 476).

VI. THE SUPREME COURT NEED NOT ADDRESS THE DISPUTED FACTUAL ISSUES RAISED BY THE STATE.

The State fails to make a valid legal challenge to Edgewood's argument regarding the trial court's judgment. The State's reliance on *Jamestown Partners., L.P. v. City of Fort Worth*, 83 S.W.3d 376, 386 (Tex. App.—Fort Worth 2002, pet. denied) and *Tenery v. Tenery*, 932 S.W.2d 29, 30 (Tex. 1996) (per curiam) to support the trial court's judgment is misplaced. *Jamestown Partners* involved conclusions that were reasonable and the omission of the conclusions did not prevent the appellants from presenting their appeal. *See* 83 S.W.3d at 386. The *Tenery* Court held that the lower court had correctly found that the petitioner was not harmed by the trial court's failure to make findings and conclusions because there was ample evidence in the record to support the judgment. *See* 932 S.W.2d at 30.

Unlike the two cases relied-upon by the State, the trial court's original findings and conclusions in this appeal are not based upon the evidence and are inconsistent with the ultimate conclusion of law. *See* Edgewood Appellants' Br. §§ III & IV. The trial court failed to provide findings of fact that supported, much less related to, its conclusion that the system is financially efficient with respect to M&O.[10] Further, the findings of

[10] Though the State readily admits that a gap in funding exists and that the only question left is whether that gap renders the system unconstitutional, the State proceeds to offer evidence of an FSP gap that Edgewood Appellants dispute. *See supra* part III(A)

fact that do exist are unrelated to the conclusion of the trial court and actually support Edgewood Appellants' claim. *See id.*

The State also misreads *Cherne Industries, Inc. v. Magallanes*, 763 S.W.2d 768, 773 (Tex. 1989), as providing support for its proposition that "the proper remedy is abatement and remand to the trial court." *See* State Appellees' Br. at 40. The proper remedy found in that case was not "abatement and remand" but rather "reversal and remand" to the lower court, which is the same type of alternative relief requested by Edgewood Appellants. *See* Edgewood Appellants' Br. at 34.

The State also incorrectly maintains that Edgewood Appellants did not suffer injury. Harm is demonstrated when "circumstances of the particular case would require an appellant to have to guess the reason or reasons that the trial judge has ruled against it." *Sheldon Pollack Corp. v. Pioneer Concrete of Texas, Inc.*, 765 S.W.2d 843, 845 (Tex. App.—Dallas 1989). The trial court's decision provides no basis to understand how the court found the system to be financially efficient; Edgewood Appellants are left to guess the reasons of the trial judge's conclusions.

Conclusion

The State's reluctance to recognize that Texas has been unable to maintain the level of equity present during the *Edgewood IV* litigation prevents property-poor districts from providing their children an adequate education. Edgewood Appellants urge the Court to step in and reverse the trial court's decision before more generations of children are lost to an inequitable and inadequate system. In the alternative, Edgewood Appellants ask the Court to reverse and remand to the trial court for further proceedings.

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Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of this instrument was served on all counsel of record in accordance with Rule 9.5(e) of the Texas Rules of Appellate Procedure, and sent by electronic mail to each counsel this 6th day of June, 2005

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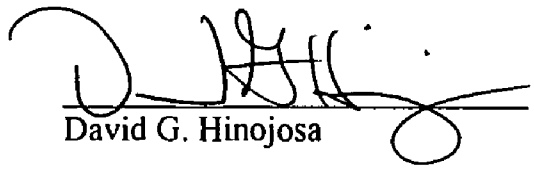

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